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TEXAS REAL ESTATE COMMISSION

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Mr. Douglas E. Oldmixon, Executive Director
Texas Real Estate Commission
1700 Congress Avenue #400
Austin, TX 78701

Via Personal Delivery


Re: SOAH Docket No. 329-16-2960.REC; Texas Real Estate Commission v Josef
Adam Riekers; Motion for Re-Hearing

Dear Mr. Oldmixon:

Please see the enclosed *Applicant's Reply to Respondent's Motion for Re-Hearing*. Feel
free to contact me if you wish to discuss this matter.

Very truly yours,

BERTOLINO LLP

By: 
Christopher G. Henderson
For the Firm

1556-001; CGH/tac

Enclosure; *Respondent's Reply to Petitioner's Reply in Opposition
to Respondent's Motion for Re-Hearing* (27 pages)

cc: Mr. Josef Adam Riekers (*Via Email*)

Client file

Mr. Douglas E. Oldmixon

Texas Real Estate Commission

Respondent's Reply to Petitioner's Reply in Opposition to Respondent's Motion for Re-Hearing

March 27, 2017

CERTIFICATE OF SERVICE

I certify that on March 27, 2017, a true copy of the foregoing *Respondent's Motion for Re-Hearing* was served on the following party by personal delivery, in accordance with TEX. GOV'T CODE §§ 2001.142(a) & 2001.146(a):

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***Executive Director of Petitioner,
Texas Real Estate Commission***



Christopher G. Henderson

SOAH DOCKET NO. 329-16-2960.REC
TREC HEARING NO. 151016

TEXAS REAL ESTATE COMMISSION, <i>Petitioner</i>	§	BEFORE THE STATE OFFICE
	§	
	§	
v.	§	OF
	§	
JOSEF ADAM RIEKERS, <i>Respondent.</i>	§	
	§	ADMINISTRATIVE HEARINGS

**RESPONDENT’S REPLY TO
PETITIONER’S REPLY IN OPPOSITION TO
RESPONDENT’S MOTION FOR RE-HEARING**

TO THE TEXAS REAL ESTATE COMMISSION:

COMES NOW JOSEF ADAM RIEKERS, Respondent in the above-styled cause, by and through counsel and pursuant to TEX. GOV’T CODE § 2001.146, TEX. ADMIN. CODE TITLE 1 PART 7 §155.509, and TEX. ADMIN. CODE TITLE 22 PART 23 §533.8, and brings this Reply to *Petitioner’s Reply in Opposition to Respondent’s Motion for Re-Hearing*, and in support thereof, respectfully shows the Commission the following:

I. BASIS FOR OPPOSITION

A. ALJ’S AUTHORITY TO ASSIGN BURDEN OF PROOF IS ABSOLUTE AND ENDURES POST-SOAH HEARING

1. ALJs have absolute authority to assign the burden of proof in contested cases, and such assignment necessarily endures post-hearing:

“The judge *shall* have the power to regulate prehearing matters, the hearing, *post-hearing matters*...including the power to:

(7) designate the party with the burden of proof pursuant to § 155.427 of this chapter...”

1 TEX. ADMIN. CODE § 155.153(b)(7) (emphasis added).

i. TREC IS NECESSARILY BOUND BY ALJ'S ASSIGNMENT OF BURDEN OF PROOF; ALTERNATIVE IS ABSURD

2. While TREC “is not bound by the sanction recommendations of the ALJ”, TREC is bound by the burden of proof assignments by the ALJ. *Id.*; TEX. ADMIN. CODE § 155.427. The absolute, enduring authority of ALJs over assignment of the burden of proof presumably exists to prevent SOAH from being a toothless institution.

ii. TREC'S JURISDICTION ARGUMENT WITHOUT SUPPORT FROM LAW OR REASON

3. TREC's claim that on February 13, 2017, SOAH had no jurisdiction over SOAH Contested Case No. 329-16-2960 is incorrect and has no support in law or reason. The plain language of 1 TEX. ADMIN. CODE § 155.153(b)(7) roundly refutes this argument; ALJs control allocation of the burden of proof before, during, and after contested case hearings. TREC does not have any power over assigning the burden of proof – let alone power to directly contravene the Honorable ALJ Steven Arnold, the Texas Administrative Code, and the Legislature of the State of Texas.

4. The purpose of 1 TEX. ADMIN. CODE § 155.153(b)(7) can be discerned quite easily – perhaps most easily by carrying TREC's argument about its purported authority over post-hearing matters to its ‘logical’ conclusion. If TREC possessed the authority to shrug so integral an element of its legal duty as the burden of proof, which was properly assigned to it by the Honorable ALJ Steven Arnold, merely because the SOAH hearing adjourned, there would be no purpose in holding a SOAH hearing at all. SOAH hearings would be hollow charades; moot court exercises funded by the tax payers. SOAH hearings, their presiding ALJs, and respondents alike would merely be powerless spectators to an exercise in absolute authority by TREC. This cannot be and is not the case.

iii. TREC FAILS TO RESPOND TO, LET ALONE REFUTE, THE BURDEN OF PROOF AUTHORITY MARSHALLED BY RIEKERS

5. TREC's Opposition does not even *respond* directly to the statutory authority marshalled by Riekers in his Motion for Rehearing, which unequivocally establishes that the ALJ wields absolute jurisdiction over assignment of the burden of proof. Rather, TREC hangs its hat on the purported eminence of “Commission Rules”. TREC's failure to directly respond to said statutory authority is quite ironic

in light of the comment that Riekers purportedly does not deserve a rehearing because “he has failed to advance a colorable claim that procedural requirements of statutes or rules were not followed.” *Petitioner’s Reply in Opposition to Respondent’s Motion for Rehearing* at p.5 (filed on March 24, 2017).

iv. A RUNNING TALLY OF TREC’S REVERSIBLE ERROR

6. As conclusively established in his *Motion for Rehearing* and the instant *Opposition*, TREC has committed reversible error in the following ways, which entitles Riekers to a rehearing:

- (i) violating the due process “requirements” of the respective Constitutions of the United States and of the State of Texas (**U.S. CONST. AMEND. XIV; TEX. CONST. ART. I, § 19**);
- (ii) violating multiple code sections of the Texas Administrative Code (**TAC §§ 155.153(b)(7) & 155.427**); and,
- (iii) perhaps worst of all, seeking now to violate TREC’s own rules and the Administrative Procedure Act in one fell swoop, by denying Riekers a rehearing, despite statutory entitlement based on TREC’s conduct (**COMMISSION RULE § 533.8(c); TEX. GOV’T CODE §§ 2001.145-147**).

7. It strains the imagination to fathom how any respondent could possibly have a stronger claim to a rehearing than Riekers’ claim. TREC has ignored virtually all relevant authority, from at least five different bodies of law of disparate jurisdiction.

v. MISREPRESENTATIONS OF THE LAW AT “MEETINGS” ARE GRAVE AND CANNOT REMAIN INADEQUATELY CHECKED

8. The discussion by Commission panel members at the “Meeting” did not proceed based on any hard citations to authority, but literally to the unsubstantiated ‘feelings’ of the Commission members, which were then promptly restated as though they were definitive, authoritative recitations of the law:

“In conclusion of law number (8), the ALJ says that staff met its burden of proof to demonstrate the respondent's license should be revoked, but has not met its burden of proof that the revocation should not probated. **I asked both Mr. Moore and Mr. Bertolino** about this, you know, where this came from,

and neither particularly understood or had any evidence or suggestion that this was, you know, a law, and so I feel like the ALJ erred here. So I would like to move to set aside the ALJ's Proposal For Decision and revoke the license, due to inaccurate conclusion of law, specifically number (8), because staff is not required to prove that a revocation should not be probated."

EXHIBIT "A" at 12:10-23.

9. Regardless of the Commissioner's "feelings", the ALJ did not err. That the 'feelings' of a Commission member, which are *contrary to the law*, could supersede the reasoned analysis of the ALJ is gravely problematic. This is a quintessential example of rule by people rather than by policies, and is contrary to the most fundamental tenets of our legal system: that the law should be discharged pursuant to impartial operation of law rather than partial operation of an arbiter's individual conscience.

B. TREC MISUNDERSTANDS THE AUTHORITY GOVERNING MODIFICATION OF PROPOSALS FOR DECISION

i. COMMISSION RULE §533.7(E) PROVIDES TREC NO REFUGE FROM DUE PROCESS VIOLATION

10. Simply because "Commission Rule §533.7(e) places all parties on notice that the Commission may change a finding of fact or conclusion of law" does not change the fact that TREC willfully denied Riekers his Constitutional entitlement to due process of law. Statutory stipulation that TREC may modify a finding of fact or conclusion of law does not constitute fair notice to Riekers of the novel argument used to deprive him of his livelihood. Nor does such statutory language excuse TREC from its Constitutional duty to disclose its core arguments and legal theories when doing so.

ii. TREC HAD NO RIGHT TO MODIFY THE ALJ ARNOLD PFD

11. Simply because "Commission Rule §533.7(e) places all parties on notice that the Commission may change a finding of fact or conclusion of law" does not render TREC's modification of the ALJ Arnold PFD proper. COMMISSION RULE § 533.7(F) prescribes the conditions which permit modifying a proposal for decision:

- (i) if the ALJ “did not properly apply or interpret applicable law, agency rules, written policies provided by staff or prior administrative decisions;”
- (ii) if “a prior administrative decision on which the [ALJ] relied is incorrect or should be changed; or”
- (iii) if “a technical error in a finding of fact should be changed.”

12. None of the prescribed conditions requisite to modifying a proposal for decision were met in the instant case: ALJ Arnold properly applied the applicable law in assigning the burden of proof (1 TEX. ADMIN. CODE §§ 155.153(b)(7) & 155.427); ALJ Arnold did not rely on any prior administrative decisions; there was no technical error in the ALJ Arnold PFD. Therefore, TREC acted beyond the scope of its authority when it removed the probation provision from the ALJ Arnold PFD.

C. TREC’S BURDEN OF PROOF ARGUMENT WAS NOVEL

13. TREC represents that the burden of proof argument used by TREC to revoke rather than probate Riekers’ license was not novel, as the burden of proof was a subject of discussion in closing briefs from both parties as well as the ALJ Arnold PFD. For sake of clarification, Riekers will refer to the closing briefs and the ALJ Arnold PFD as the “Closing Conversation”.

14. TREC argues that because the burden of proof was addressed by all parties in the Closing Conversation, Riekers therefore enjoyed due process. This is a classic example of selective stipulation and omission. It is also a mere distraction.

i. NO FAIR NOTICE IN TREC’S CLOSING BRIEF

15. TREC’s discussion of the burden of proof in its closing brief is broad and general. The at-issue argument by TREC that it shoulders no burden to prove that revocation should not be probated is very specific. The broad, general discussion in TREC’s closing brief makes no mention, explicit or implicit, of this specific argument:

“After the Petitioner met its burden of proof through testimony and documentary evidence that revocation was the appropriate sanction, it was then the Respondent’s burden to prove that

sufficient mitigating factors existed to warrant a lesser disciplinary sanction than revocation. The Respondent did not meet its burden.”

Petitioner’s Closing Statement at p.3.

Representing that this broad, general mention constitutes fair notice of the very specific argument at issue is more than a stretch.

ii. RIEKERS DID NOT PUT HIMSELF ON FAIR NOTICE OF TREC’S NOVEL ARGUMENT

16. TREC argues that TREC did not deprive Riekers of due process because Riekers mentions the concept of burden of proof in his closing brief. In this classic example of sophistry, TREC essentially argues that Riekers put himself on fair notice of the at-issue burden of proof argument used by TREC.

17. First, Riekers cannot put himself on notice of an argument that another party intends to use against him.

18. Second, even if Riekers had discussed the at-issue burden of proof argument in his closing brief, and thereby rendered the argument no longer novel, TREC would still have a duty to provide Riekers with notice of TREC’s intent to use this argument as the sole basis to deprive him of his livelihood.

19. TREC shrugged its duty to notify Riekers of its intent to use a novel argument to deprive him of ability to work and feed his family.

iii. ALJ ARNOLD PFD DID NOT PUT RIEKERS ON FAIR NOTICE OF TREC’S NOVEL ARGUMENT

20. The argument that TREC did not deprive Riekers of due process because the ALJ Arnold PFD addresses the burden of proof also falls flat. The ALJ Arnold cannot put Riekers on fair notice of an argument that TREC intended to use against him at a post-hearing meeting. TREC shrugged its duty to notify Riekers of its intent to use a novel argument to revoke his livelihood and means of feeding his family.

iv. NO FAIR NOTICE ANYWHERE IN THE RECORD

21. TREC's erroneous argument appears nowhere in the record before the "Meeting". This conclusively establishes that no fair notice was given. No amount of semantics can gloss over that fact. TREC deprived Riekers of fair notice of the novel argument used to revoke his license, and thereby deprived him of due process.

D. EXCEPTIONS ARE PERMISSIVE, BUT DUE PROCESS IS MANDATORY

22. TREC is correct that exceptions to proposals for decision are permissive. 1 TEX. ADMIN. CODE § 155.507(B). Riekers explicitly acknowledged as much in his Motion for Re-Hearing (filed with the Commission on March 09, 2017). Whether exceptions are permissive is not disputed in this case. TREC's argument to that effect is merely a distraction. Exceptions are permissive, but due process remains mandatory.

iii. PROPER JUNCTURE FOR TREC TO DISCLOSE NOVEL ARGUMENT WAS DURING EXCEPTIONS PERIOD

23. The burden of proof argument used by TREC to revoke Riekers' license at the "Meeting" amounts to an exception to the ALJ Arnold PFD. The exceptions period, while permissive, was TREC's opportunity to provide Riekers with *fair notice* – that is, a reasonable opportunity to scrutinize the argument asserted and tailor a considered response. This was also TREC's opportunity to provide ALJ Arnold with notice of and an opportunity to consider TREC's argument that ALJ Arnold misapplied the authority. TREC's rejection of this opportunity deprived Riekers of due process, which necessitates the requested rehearing.

24. Certainly, the present controversy demonstrates that the permissive filing of exceptions, as contemplated by TEX. ADMIN. CODE § 155.507(b), can be problematic when objections to findings and conclusions of the ALJ are not presented timely. Blindsiding Riekers at an evidentiary hearing spuriously entitled by TREC as a mere "Meeting" with a novel legal argument is precisely the sort of conduct that the guarantee of due process exists to prevent and correct. This denial of due process is a quintessential example of arbitrary and capricious abuse of discretion, and equity demands its correction.

a. **GUARANTEE OF DUE PROCESS DEMANDS CHANGE**

25. The guarantee of due process mandates that novel arguments be disclosed during the exceptions period. The present controversy unequivocally declares as much. By remaining silent during the exceptions period, TREC simultaneously acted within its right *under the Texas Administrative Code* and violated the guarantee of due process. This paradox demonstrates the need for a change in the rules, as proposed herein.

b. **PRACTICAL CONCERNS DEMAND CHANGE**

26. Riekers agrees that TREC currently has no *legal duty* to provide the ALJ with notice of its erroneous arguments. TREC was certainly within its right to squander its opportunity to explore its argument as to who had the burden of proof, it was certainly not within its right to stay silent throughout the exceptions period and then spring a trap on Riekers and determine that it had no obligation to give credence to the ALJ's Conclusions of Law. Certainly, the present controversy demonstrates that the permissive filing of exceptions, as contemplated by **TEX. ADMIN. CODE § 155.507(b)**, can be problematic when objections to findings and conclusions of the ALJ are not presented timely.

27. If an administrative agency disputes any conclusion of law in a proposal for decision, based on a novel argument, and that new argument serves as the basis for adverse action against a licensee, prudence and equity demand that administrative agencies should file an exception revealing that argument. Failure to file such an exception should result in the agency waiving its right to take adverse action based on the novel argument. The imperative of fair notice dictates as much.

E. **THE CONTESTED CASE PROCEEDINGS AT TREC'S
"MEETING" ARE SECOND EVIDENTIARY HEARINGS**

i. **IF IT LOOKS LIKE A DUCK AND QUACKS LIKE A DUCK...**

28. The arguments that TREC advances in support of its position that the "Meeting" was *not* a second evidentiary hearing fall flat. The mere fact that "no witnesses were sworn" does not change the fact that **the Meeting was a de facto second evidentiary hearing**. The representation that "no evidence was presented" is misleading; evidence from the record was re-examined, all in the service of disciplinary deliberations. If such consideration was not germane to the ultimate decisions issued by TREC at the "Meeting", then what was the point? The famous

words of American Poet James Whitcomb Riley shed some light on the current dispute: “When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck.” When a contested case proceeding is overseen by an arbiter who solicits testimony from respondents and arguments from counsel, and poses questions to respondents and counsel, examines evidence, and unilaterally dispenses with the ALJ’s findings and conclusions without finding error, that proceeding is an evidentiary hearing.

ii. THE LEGISLATURE AND RIEKERS SEE THE SAME DUCK

29. COMMISSION RULE § 535.41 governs TREC “Meetings”. This Rule stipulates that “Proceedings in contested cases are conducted in accordance with the Administrative Procedure Act, Texas Government Code, Chapter 2001 and Chapter 533 of this title.” All other proceedings at these “Meetings” are governed by Robert’s Rule of Order. **TEX. ADMIN. CODE § 535.41(D)(1)**. The distinction demonstrates that the contested case proceedings at the “Meeting” are sufficiently unique and material to require observance of SOAH rules – just as is the case with traditional, properly declared contested case proceedings in SOAH. Clearly, the Legislature even recognizes the essential nature of the contested case proceedings held at these “Meetings”.

ii. TREC MISREPRESENTS THE COMMISSION RULES

30. “Commission Rules” actually do not provide notice that TREC “is entitled to ask questions regarding the record and arguments made before the Commission” during its “Meetings”. That is why TREC chose to vaguely adduce “Commission Rules” in support of that un-tenable position, rather than a specific code section; no such “Rule” exists.

II. PRAYER

WHEREFORE, PREMISES CONSIDERED, Riekers respectfully requests that the Texas Real Estate Commission grant *Respondent’s Motion for Re-Hearing*, and set a date for re-hearing of the above-styled cause so that Riekers may enjoy due process, and will not be forced to pursue judicial review.

Respectfully submitted,

BERTOLINO LLP

By: 

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***Attorney for Respondent,
Josef Adam Riekers***

CERTIFICATE OF SERVICE

I certify that on March 27, 2017, a true copy of the foregoing *Respondent's Reply to Petitioner's Reply in Opposition to Respondent's Motion for Re-Hearing* was served on the following party via hand delivery, in accordance with TEX. GOV'T CODE §§ 2001.142(a) & 2001.146(a):

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***Attorney for Petitioner,
Texas Real Estate Commission***



Christopher G. Henderson

Agenda Item 11(g)
February 13, 2017

1 TEXAS REAL ESTATE COMMISSION
2 STEPHEN F. AUSTIN BUILDING, ROOM 170
3 1700 NORTH CONGRESS
4 AUSTIN, TEXAS 78701
5 Agenda Item 11(g)
6 February 13, 2017
7
8 TRANSCRIPT OF YOU TUBE VIDEO EXCERPT
9
10 TEXAS REAL ESTATE COMMISSION QUARTERLY MEETING
11 AGENDA ITEM 11(G)
12
13 February 13, 2017
14 2:21:12 - 2:35:30
15
16 COMMISSIONER THOMAS (TJ) TURNER, Chair
17 COMMISSIONER ADRIAN A. ARRIAGA, Vice-Chair
18 COMMISSIONER RAYITO STEPHENS
19 COMMISSIONER CHART WESTCOTT
20 COMMISSIONER WESTON MARTINEZ
21 COMMISSIONER BILL JONES
22 COMMISSIONER BOB LEONARD
23 COMMISSIONER AVIS WUKASCH
24 MARK MOORE, ESQ.
25 KERRI LEWIS, ESQ.
SANDRA M. ZIMMERMAN, ESQ. U.S. LEGAL SUPPORT
866-339-2608
TONY R. BERTOLINO, ESQ.

Transcribed By:
TERRI NESTORE
CSR No. 5614, RPR, CRR

U.S. LEGAL SUPPORT
866-339-2608

1 (2:21:12)

2 COMMISSIONER TURNER: All right, moving on to
3 11(g).

4 MS. LEWIS: 11(g) is TREC vs. Josef A. Riekers.
5 It's a revocation case. Agenda Item 11(g)
February 13, 2017 Staff brought revocation based on
6 a felony conviction, making the respondent unfit to hold a
7 license. The ALJ recommended revocation, but that it be
8 probated for ten years. Respondent filed exception and
9 staff filed a reply. The ALJ made no changes to the PFD
10 based on those filings.

11 COMMISSIONER TURNER: Thank you. Mr. Moore.

12 MR. MOORE: On this one we don't fully agree with
13 the Proposal For Decision. This one kind of hit home to
14 me personally, but I have to put that aside. A ten-year
15 probate or revocation is not insignificant. We did think
16 he should be revoked, but we'll obviously go with what the
17 Commission wishes on that, and we're available to answer
18 any questions on this case.

19 COMMISSIONER TURNER: Any questions for Mr. Moore
20 right now?

21 COMMISSIONER WESTCOTT: Yes.

U.S. LEGAL SUPPORT
866-339-2608
22 COMMISSIONER TURNER: Mr. Westcott.

23 COMMISSIONER WESTCOTT: I have one very simple
24 question, and that is under conclusion of law number (8),
25 is staff required to prove that a revocation should not be

1 probated, as a burden of proof?

2 MR. MOORE: Not to my knowledge.

3 I've seen this for the first time.

4 COMMISSIONER TURNER: That's on page 320 of the
5 materials. It's conclusion of law number (8) that he's
6 referencing.

7 MR. MOORE: Yeah, I've never heard of that burden
8 of proof. And I mean, we didn't agree with the decision a
9 hundred percent because the guy basically stole government
10 property, abused public trust and now is a fiduciary.

11 That was our basic argument against him.

12 COMMISSIONER WESTCOTT: I have a motion, if
13 no one has any questions.

14 COMMISSIONER TURNER: Well, I just got a slip
15 that Mr. Tony Bertolino -- is that correct?

16 MR. BERTOLINO: That is correct.

17 COMMISSIONER TURNER: Are you here to speak on
18 behalf of the applicant?

19 MR. BERTOLINO: I am.

20 COMMISSIONER TURNER: Come on up.

21 MR. MOORE: He filed a Motion to Withdraw, but we
22 don't oppose it, I guess, if he's appearing.

23 COMMISSIONER TURNER: What?

24 MR. MOORE: He filed a Motion to Withdraw in this
25 case.

1 COMMISSIONER TURNER: You filed a Motion to
2 Withdraw?

3 MR. BERTOLINO: Actually, I withdrew my motion.

4 MR. MOORE: Obviously no objection.

5 COMMISSIONER TURNER: U.S. LEGAL SUPPORT
February 13, 2017 Sure. Come on up. All
6 right, come on up. I'm going to do my best to limit you
7 to three minutes, so tell us -- tell us why the judge is
8 right and why the staff is wrong.

9 MR. BERTOLINO: Well, thank you for allowing me
10 to appear.

11 COMMISSIONER TURNER: Yes, sir.

12 MR. BERTOLINO: I am appearing on behalf of my
13 client, Mr. Josef A. Riekers, and one of the interesting
14 things about how Judge Arnold assessed this case is that
15 he really considered the mitigating circumstances of Josef
16 Riekers. If you would -- if everyone's had an opportunity
17 to review the file, in particular Mr. Riekers is a 9/11
18 hero. He was actually at Ground Zero and received
19 multiple commendations because of that.

20 He's actually -- on page 11 of the PFD, Judge
21 Arnold laid out a list of all of the different kinds of
22 U.S. LEGAL SUPPORT
866-339-2608 services and commendations that Mr. Riekers had obtained
23 post the plea bargain agreement that he entered into.

24 In addition, the -- there were multiple witnesses
25 that appeared on his behalf at the hearing, both by

1 written form, in the form of references, as well as actual
2 testimony, and page 7 of the Proposal For Decision
3 actually lays out some additional commendations that
4 Mr. Riekers received since 9/11 essentially.

5 And Mr. Riekers, as detailed through his entire career,
6 has been in law enforcement. He acknowledged that he did
7 make a mistake, and he -- which is contrary to the
8 statements that were made by Ms. Zimmerman at the hearing,
9 and that's listed on page 9 of the Proposal For Decision,
10 where she indicated that Mr. Riekers feels no remorse for
11 his conduct, and I can assure you as his attorney, working
12 with him for a couple of years now with this case, that he
13 has absolute remorse for what he did, and he's
14 acknowledged that. So I would hope that the Commission
15 would take into consideration the recommendations that
16 were made by the ALJ. Mr. Riekers is prepared to accept
17 those recommendations.

18 COMMISSIONER TURNER: Thank you. Any questions
19 for Mr. Riekers' counsel? Mr. Westcott?

20 COMMISSIONER WESTCOTT: Yeah, I have the same
21 question for you. Is there anything you can offer to
22 support conclusion of law number (8) that staff is
23 required to prove that a revocation should not be
24 probated?

25 MR. BERTOLINO: Quite frankly, I didn't research

1 that issue. I'm actually curious about it. I actually
2 wrote it in my notes and -- but I don't have anything to
3 provide the Commission this afternoon.

4 COMMISSIONER WESTCOTT: Thank you.

5 COMMISSIONER ~~TURNER~~ ^{TURNER Rem 11A} Any other questions right
_{February 13, 2017}
6 now? Mr. Bertolino, if you would sit tight, we may call
7 you back up in a second.

8 MR. BERTOLINO: Thank you.

9 COMMISSIONER TURNER: And Mr. Moore, I'm going to
10 ask you, as you're coming up, please, sir, same thing we
11 did earlier. You're asking us -- and I understand that
12 you've laid it out, but can you summarize for us, please,
13 sir, what you think the ALJ got wrong here, and why you
14 would have us modify that decision, and then how you would
15 have us modify it.

16 MR. MOORE: Yes. And what disturbs me about this
17 so tremendously is he was law enforcement. He's supposed
18 to be the good guys. He's supposed to be protecting us,
19 watching out for us. Instead, he stole ammunition from an
20 armory, a federal armory, and who knew that the Federal
21 Health and Human Services has multiple armories around the
22 country, but he stole from ^{U.S. LEGAL SUPPORT} that repeatedly, sold it on the
₈₆₆₋₃₃₉₋₂₆₀₈
23 internet.

24 If I went back to my office as your enforcement
25 person, I stole a computer out of someone's office, sold

1 it; did it a week later, took a computer, sold it on the
2 internet; did it a third time, I know darn well I'd be
3 fired, and I'm pretty sure the State Bar would be mad at
4 me, and I would bet if I applied for another license, they
5 would look at that very seriously. This is an abuse of
6 public trust. It bothers me a great deal that this person
7 is even getting a license at all. But I do recognize ten
8 years probate revocation is serious.

9 COMMISSIONER TURNER: Ms. Zimmerman, do you have
10 any comments?

11 MS. ZIMMERMAN: Yes, just regarding the
12 statements in our closing arguments. They are taken
13 directly from a tape of the hearing. We quote, in part --
14 sorry, I'm trying to get to those again.

15 Basically if you'll refer to the closing
16 arguments that state what Mr. Bertolino has just said is
17 in fact that his client, Mr. Riekers, has shown remorse.

18 In fact, he stated in the hearing, in part in
19 substance, I feel responsible. And in fact, what he said
20 was -- in the plea agreement, when asked about it, he said
21 even though he signed off to the plea agreement, even
22 though he signed off to the factual summary, he said, I
23 didn't pick or choose the words. He testified that he did
24 not wholeheartedly agree with those statements.

25 So while he may have evidenced many more

1 statements of remorse or understanding of his crime or
2 understanding of the amounts, which come directly from
3 tapes of the hearing, he did not do that in the hearing.

4 So I just want to clarify the record on those
5 statements. Nothing but sitting there and listening to
6 the tapes would cause me to put quote marks around those
7 remarks in our statement.

8 COMMISSIONER TURNER: Thank you. Any questions
9 for Ms. Moore -- I mean for Mr. Moore or Ms. Zimmerman
10 right now? No? Do you have any further questions for
11 Mr. Bertolino?

12 COMMISSIONER LEONARD: I do.

13 COMMISSIONER TURNER: Would you please come back
14 to the lectern? Thank you. And is Mr. Riekers here?

15 MR. BERTOLINO: He is not.

16 COMMISSIONER TURNER: Okay, thank you.

17 Commissioner Leonard, I believe had a question.

18 COMMISSIONER LEONARD: Mr. Riekers was in the law
19 enforcement business -- profession and as such -- and I'm
20 just going to make this very simple -- he violated the
21 public trust not just once, not just twice, but multiple
22 times. What could the mitigating circumstances you
23 mentioned earlier possibly be?

24 MR. BERTOLINO: Well, if I could,
25 Mr. Commissioner, one of the things that -- that needs

1 clarification, I believe, is the terms of the plea bargain
2 agreement itself and the facts surrounding the offense.

3 He didn't -- what he ended up doing, he received
4 no monies, no consideration at all when -- when he was
5 trading artillery or bullets, and that's what the offense
6 related to. He was trading them online and swapping them
7 evenly online. So there was no theft -- well, there is
8 theft and again, I'm not going to try to make any kind of
9 argument, and neither is my client, that he's not -- the
10 plea bargain that he entered into and the facts in that
11 plea bargain are certainly relevant and true, but I do
12 want to clarify to the Commission that we were talking
13 about bullets that Mr. Riekers traded online, and they
14 weren't ones that he happened to pocket and use himself or
15 sell them in any way.

16 COMMISSIONER LEONARD: And what happened to the
17 ammunition, then, that he traded for?

18 MR. BERTOLINO: They were equal trade for other
19 ammunition, and that's what he got.

20 See, Mr. Riekers, when he worked at the Inspector
21 General's Office, was in charge of assisting his staff
22 with target training, and that was one of his jobs there.
23 And so he had access to ammunition, and so what he ended
24 up doing was he traded that ammunition. It was an online
25 trade of one bullet for one bullet, and that's what he

1 ultimately did with that ammunition. And it was the
2 ammunition that he actually used in training, to train his
3 staff at the Inspector General's Office.

4 So what we're talking about, again, is an
5 offense. I mean, certainly it is a theft.
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6 COMMISSIONER LEONARD: So he had a bullet, I have
7 a bullet.

8 MR. BERTOLINO: Correct.

9 COMMISSIONER LEONARD: He gives me the bullet
10 that he took --

11 MR. BERTOLINO: That's correct.

12 COMMISSIONER LEONARD: -- unauthorized from the
13 armory.

14 MR. BERTOLINO: That's right.

15 COMMISSIONER LEONARD: He gives me another bullet
16 -- what did he do with the bullet I gave him?

17 MR. BERTOLINO: He used it for both work and
18 personal usage. It's still a trade. I mean, I'm not in
19 any way, you know, downplaying the severity of it. I
20 mean, please don't assume that. But what I am saying is
21 that he wasn't -- he didn't obtain the ammunition and then
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22 later sell it on the market. That wasn't the -- you know,
23 what he was ultimately accused of and found guilty of.

24 COMMISSIONER LEONARD: But he traded something --
25 he stole something of value, traded it for something of

1 value for his personal use.

2 MR. BERTOLINO: Correct.

3 And it was an even swap.

4 COMMISSIONER LEONARD: I'm having a real hard
5 time justifying that. Agenda Item 11(g)
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6 MR. BERTOLINO: I just want to make sure that the
7 Commission understands that it wasn't -- he wasn't part of
8 a large operation of stealing ammunition and selling it
9 overseas or, you know, that kind of circumstance. I just
10 wanted to -- and again, it doesn't downplay the
11 circumstance itself -- I'm not saying that whatsoever --
12 but I just wanted to clarify the record and explain
13 further as to what he did, what that offense entailed and
14 that was, again, swapping or trading ammunition.

15 But at the end of the day, it's still theft.

16 I mean, he's acknowledged that.

17 He signed a plea bargain to that effect.

18 COMMISSIONER TURNER: Commissioner Westcott, any
19 other questions?

20 COMMISSIONER WESTCOTT: I have a motion, whenever
21 we're ready.

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COMMISSIONER TURNER: Okay.

23 And I didn't mean to interrupt that -- yeah, I
24 did. Commissioner Leonard, are you finished?

25 COMMISSIONER LEONARD: I'm done.

1 COMMISSIONER TURNER: Do we have any other
2 questions for Mr. Bertolino? Thank you.

3 COMMISSIONER: Mr. Bertolino, what law school did
4 you attend?

5 MR. BERTOLINO: Agenda Item 11(g)
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6 COMMISSIONER: Thank you.

7 COMMISSIONER WESTCOTT: So one of the ways that
8 we can set aside an ALJ's decision is by showing that they
9 did not base their conclusion accurately on the law.

10 In conclusion of law number (8), the ALJ says
11 that staff met its burden of proof to demonstrate the
12 respondent's license should be revoked, but has not met
13 its burden of proof that the revocation should not
14 probated. I asked both Mr. Moore and Mr. Bertolino about
15 this, you know, where this came from, and neither
16 particularly understood or had any evidence or suggestion
17 that this was, you know, a law, and so I feel like the ALJ
18 erred here.

19 So I would like to move to set aside the ALJ's
20 Proposal For Decision and revoke the license, due to
21 inaccurate conclusion of law, specifically number (8),
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866-339-2608 because staff is not required to prove that a revocation
23 should not be probated.

24 COMMISSIONER LEONARD: I second it.

25 COMMISSIONER TURNER: Second.

1 I have a motion and I have a second.

2 MS. LEWIS: Can I make a comment?

3 COMMISSIONER TURNER: Yes, Ms. Lewis.

4 MS. LEWIS: I would just say that under the
5 statute and under our rules, whether to grant probation is
6 discretionary to the Commission.

7 MR. MOORE: Right.

8 COMMISSIONER TURNER: Absolutely.

9 COMMISSIONER WESTCOTT: So given that, and just
10 to reiterate, under the ALJ's own initiative he says that
11 we met -- the staff met the burden of proof to revoke.

12 There is no burden of proof not to probate, so
13 under the rule, we should move forward.

14 COMMISSIONER TURNER: I have a motion and I have
15 a second. All those in favor of modifying the Proposal
16 For Decision to remove the probation and to have it
17 revocation of the license without the probation, say aye.

18 COMMISSIONERS: Aye.

19 COMMISSIONER TURNER: All those opposed?

20 Okay, motion carries.

21 (End of transcription - 2:35:30.)

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C E R T I F I C A T E

I, TERRI NESTORE, Certified Shorthand Reporter/
Transcriptionist, do hereby certify that I was authorized
to transcribe the foregoing recorded proceeding, and that
the transcript is a true and accurate transcription of my
shorthand notes, to the best of my ability, taken while
listening to the provided recording.

Dated this 28th day of February, 2017.



TERRI NESTORE, CSR, RPR, CRR

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